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January 16, 1996

The Honorable Mel R. Jiganti  
Chairman  
Copyright Arbitration Royalty Panel  
Library of Congress  
P.O. Box 70977  
Southwest Station  
Washington, D.C. 20024

Re: 1990-92 Cable Royalty Distribution Proceeding

Dear Judge Jiganti:

On behalf of the Public Broadcasting Service ("PBS") we are writing to provide the Panel with an original signature page for M. Peter Downey, one of the PBS witnesses. Mr. Downey provided a facsimile signature for the version of the case that was previously filed with the Library of Congress.

We are also writing to submit a number of minor changes to the 1990-92 Direct Case of PBS. The changes are summarized below:

Introduction

- Page 2 -- The adjusted Bortz figures mentioned in connection with Dr. Fairley's testimony are revised to reflect the figures in his testimony.

Testimony of Jennifer Lawson

- Page 8, note 5 -- Exhibit number is changed from 16 to 15 to reflect location of Newsweek cover story.
- Page 22 -- Reference is added to Exhibit 13 which lists PBS Emmy awards.

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Page 2

- Page 25, note 10 -- Citation to census statistics is revised slightly to correct typographical errors and add correct series number for 1991.
- Page 25 -- Approximate percentage of households with children under twelve is corrected.
- Page 27 -- Word "million" is deleted from the figure for average household contribution.

#### Testimony of John Fuller

- Page 2 -- Public television's share of all funds under the Bortz study is changed from "60%" to "6%." Slight changes are made to cable household percentages to correct typographical errors ("4.6%" is changed to "4.5%" and "5.7%" is changed to "5.6%").
- Pages 10 and 13 -- Same changes to cable household percentages are made.
- Page 14 -- Same revision is made to census citation.
- Page 26 -- Increase in overall level of license fees is changed from "14.25%" to "14.21%."
- Page 27 -- 1992 figures have been revised slightly.

#### Testimony of M. Peter Downey

- Page 13-14 -- Please note that the first part of the third paragraph on page 13 is repeated on page 14, where the paragraph appears in its entirety.

#### Exhibits

- List of Exhibits -- A few errors in exhibit titles on the second page are corrected.
- Exhibits 4 and 5 -- These exhibits have been made shorter, and one new children's programming segment has been added to Exhibit 5.

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- Exhibit 14 -- Certain modest computational errors have been corrected.
- Exhibit 22 -- 1989 figures which had been inadvertently omitted are added to the table to correspond to references in text.
- Exhibit 23 -- Same changes to cable household percentages mentioned above under Fuller testimony are made.
- Exhibit 30 -- Material is added to clarify citation.
- Exhibit 32 -- Typographical error is corrected (".06" is changed to ".07") and citation is revised.

Where appropriate, substitute pages have been provided. An original and two copies of videotape Exhibits 4 and 5 are also included.

We apologize for providing this material at this stage in the proceeding. (It proved impossible to file these corrections last week due to the storm.) We believe that, given the minor nature of these revisions, no party will be prejudiced by the submission of this material at this time.

Respectfully submitted,

*Michele J. Woods*

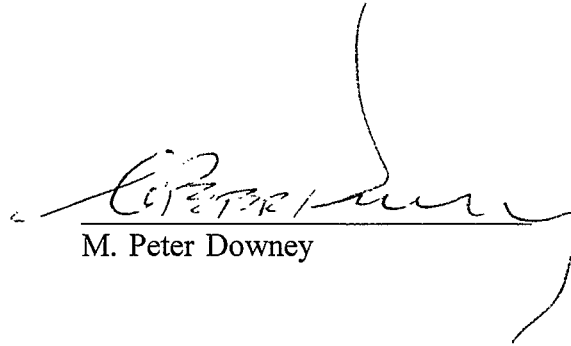
Michele J. Woods

Counsel for Public  
Television Claimants

cc: The Honorable John B. Farmakides  
The Honorable Ronald P. Werthheim  
All Counsel of Record

**-- DOWNEY ORIGINAL SIGNATURE PAGE --**

I declare under penalty of perjury that the foregoing is true and correct to  
the best of my knowledge, information and belief.



M. Peter Downey

Executed this 18th day of  
August, 1995.

**-- INTRODUCTION --**

- Jennifer Lawson will also emphasize that 1990-1992 was a watershed period for public television programming. With successes such as THE CIVIL WAR, and with many other highly visible new programming and promotional initiatives, public television emerged as a major programming force during this period. This bears directly on the value to cable operators from the distant retransmission of public television.
- John Fuller will explain why the Bortz study sponsored by the Joint Sports Claimants should be given controlling weight in this proceeding, and why the Nielsen data on which the Program Suppliers rely can no longer be taken as a useful measure of value to cable operators from distant signal retransmission.
- Mr. Fuller will also describe a series of alternative means for estimating the value of distant signal retransmission of public television -- all of which confirm that public television should receive an award in the range of 7% of the Basic fund. As Mr. Fuller explains, these independent sources also provide powerful confirmation of the reliability of the Bortz study.
- The testimony of Peter Downey shows why the copyright owners of public television programming are significantly harmed by the distant retransmission of public television signals. Distant retransmission adversely affects local fundraising by public television stations; and it inflates the cost of public television programming by dissuading local stations from carrying it in markets with a distant signal. The result is that less money is available to compensate copyright owners for their programming on public television.
- Finally, the testimony of William Fairley shows that an adjustment to the Bortz study is required to account for the understatement of the value of PBS programming to cable operators. He will explain that for 1990-92 the adjusted figures for public television under the Bortz study are 6.1%, 6.3% and 5.7% of the Basic fund.

This witness testimony is included in Volume I of the direct case, together with Exhibits 1-7. We have also submitted a number of exhibits in Volume II, which are

**-- LAWSON TESTIMONY --**

A. 1990 Innovations

An early and particularly spectacular success of the new National Program Service was the CIVIL WAR series, which ran during the fall of 1990. Press coverage was overwhelming -- including cover stories in Newsweek and Entertainment Tonight and extensive newspaper coverage throughout the country. This was a truly enthralling series, and it was a major television event that attracted substantial numbers of viewers from commercial television.<sup>5/</sup>

The CIVIL WAR series is but one example of our renewed effort to enhance the attractiveness of public television programming. In January 1990, PBS broadcast EYES ON THE PRIZE II, an award-winning series that documented the changing nature of the American civil rights movement. The series was also offered by colleges as a telecourse in American history. In June 1990, public television aired the Metropolitan Opera's presentation of Wagner's "THE RING." This broadcast was the first time an opera of this scope (17 hours) was presented as a miniseries. It played to record audiences and garnered significant critical acclaim, including New York Magazine's special "guide" to the opera.

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<sup>4/</sup>(...continued)

of recommendations and awards presented in the PBS 1989 Direct Case by John Carey of Greystone Communications. Testimony of John Carey, 1989 Phase I Case of Public Television, PTV Ex. JC-3.

<sup>5/</sup> Included at PTV Exhibit 15 is the cover story from Newsweek as well as several other illustrative news stories on the CIVIL WAR series.

**4. Public Television Programming Receives Widespread  
Critical Acclaim and Is Thus of Substantial Benefit to  
Cable Subscribers and Operators**

Another measure of the benefit of distant retransmission of public television is the widespread critical acclaim that our programming consistently receives. The television industry has long recognized the uniquely high quality of public television programming. And television critics, similarly, consistently recommend public television programs as ones worth watching.

In 1991, for instance, PBS's programs received 25 prime-time Emmy nominations, 9 prime-time Emmys, 27 news and documentary Emmy nominations, 10 Emmy awards for news and documentaries, 21 daytime Emmy nominations, and 11 daytime Emmy awards. (See PTV Exhibit 13.) In 1991, PBS also won 5 duPont-Columbia University awards and 9 Peabody awards. (See PTV Exhibit 12.)

Recommendations given by television critics reinforce the same point. Included at PTV Exhibit 16 is a compilation of just a few of the many enthusiastic reviews given to the watershed events in public television programming in 1990 and 1991. PTV Exhibit 14 compares the number of recommendations given to public television programming in the weekly television highlights of four major newspapers to the recommendations given to non-network television and various cable channels. As these various compilations make apparent, public television has been widely recognized as

of households in this country (more than one-third) have children under the age of 12,<sup>10/</sup> the unique children's programming provided by public television can therefore be a major consideration in the attractiveness of cable services to a large segment of the population.

A cable operator without a public television station on its system would therefore be at a significant disadvantage in attracting parents with small children as subscribers. And even if the cable operator already has access to a local public television signal, it could gain significant advantage through the distant retransmission of public television signals that would add to the diversity of program and scheduling options available to those many subscribers who have a particularly strong interest in the children's programming of public television.

**B.     1990-1992 Children's Programming  
          Initiative**

The years between 1990 and 1992 were outstanding ones for children's programming on public television. One very important part of the new National Program Service was a major initiative to improve and upgrade the children's programming that we offered. In 1990, PBS broadcast several acclaimed children's specials and series,

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<sup>10/</sup> U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Household and Family Characteristics, Table 18, March 1990 (Series P-20-447); March 1991 (Series P-20-458); March 1992 (Series P-20-467).

**6. Voluntary Contributions by Public Television Viewers Show the  
Avidity of Their Interest in Public Television Programming**

The largest single source of funding for public television is the voluntary contributions made by public television viewers across the country. For instance, public television raises more money in voluntary contributions from subscribers than it receives in federal support from the Corporation for Public Broadcasting. In FY 1990, some 5.2 million households nationwide made voluntary contributions to public television. In the aggregate, these contributions amounted to roughly \$270 million, or an average of about \$52 for each contributing household. Similarly, in FY 1991, about 5.1 million households made voluntary contributions to public television, totalling approximately \$278 million, or an average of about \$55 per contributing household. The FY 1992 figures are similar: 5.1 million households contributed about \$291 million in the aggregate, for an average of about \$57 per contributing household. In FY 1993, 5.2 million households made contributions of about \$294 million, and gave an average of \$57 per household.

The fact that public television viewers across the country are willing to make voluntary contributions in these quantities is powerful evidence of their avid interest in our programming. By its very nature, much of our programming is not likely to attract large nationwide viewing audiences. Instead, we attract a highly loyal viewership for different programming "niches." That is manifest in the willingness of so many viewers to make contributions to something that they are, of course, entitled to watch for free.

**-- FULLER TESTIMONY --**

- The adjusted Bortz Study provides the best available method to measure the benefits to cable operators and the marketplace value of public television programming over the 1990-1992 period. When the appropriate factors are taken into account, public television's share of 6% of all funds under the Bortz Study is equivalent to 8% of the Basic fund. This figure is corroborated by data on the distant signal carriage of public television, which measure cable operators' actual behavior during the 1990-1992 period.
- Public television offers cable operators an exciting diversity of programming that helps them to attract and maintain viewers in different market "niches" as cable subscribers.
- Cable operators receive the greatest benefit from distant retransmission of a public television signal where no local public television signal is available. Over 2.1 million cable households, or roughly 4.5% of total cable households in the United States, receive their only public television signal via distant retransmission. In addition, another 2.6 million cable households, or another 5.6% of U.S. cable households, receive their second public television signal through distant retransmission, and thereby receive significant benefits of programming diversity and scheduling alternatives for their public television viewing.
- Cable operators receive particular benefit from the tremendous value of children's programming on public television. More than a third of U.S. households have children under the age of 12, and for such households in particular the availability of public television's renowned children's programming is an obvious reason to subscribe to cable television. Cable operators unquestionably benefit from the ability to offer this programming via distant retransmission.
- The value and benefit of public television programming to cable operators and subscribers are shown by analogy to specialty cable channels such as Arts & Entertainment and Discovery, for which cable operators are willing to pay a significant amount per subscriber. Through comparison to these specialty channels, it is

relative value confirm what the instances of carriage data show about how cable operators actually valued distant public television signals in making decisions to import distant signals during 1990-1992.

**3. The Number of Cable Households That Receive Their Only Access to Public Television Via Distant Retransmission Supports the Results of the Bortz Survey**

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The value of distant signal public television to cable programmers is also shown by the number of cable households that receive their only public television signal via distant retransmission. During the 1990-1992 time period, on average more than 2.1 million cable households, or 4.5% of cable subscribers, received their first public television station as a distant signal. This number shows an obvious and important value for cable operators serving this portion of the cable-viewing public. In addition, on average another 2.6 million cable households, or 5.6% of cable subscribers, received what was only their second public television station by distant signal. See PTV Exhibit 23.

Cable operators almost always choose to carry PBS. On average, over 99% of all Form 3 cable systems carried at least one public television signal in each year between 1990 and 1992, and on average over that same period 21% of all cable systems chose to retransmit a distant public television signal.

Given the benefits to having access to multiple public television channels, as discussed by Jennifer Lawson in her testimony, the availability of public television via

instance, additional signals can add public television programming aimed at a minority group, or providing an instructional focus.) See PTV Exhibit 26. In addition, a second or third public television station can add to scheduling diversity, even when similar programs are found on the different stations. This also can be a significant benefit to cable operators who are thereby able to offer subscribers different time options for public television programming. (For instance, there can be real benefit in having different children's programming available on different channels at different times of the day.)

As noted above, during the 1990-1992 time period, on average more than 2.1 million cable households, or 4.5% of cable subscribers, received their first public television station as a distant signal. In addition, on average another 2.6 million cable households, or 5.6% of cable subscribers, received only their second public television station by distant signal. See PTV Exhibit 23. The cable operators who serve these groups of subscribers -- representing nearly 5 million cable households, and over 10% of total cable subscribers -- clearly receive direct and substantial benefits from the distant retransmission of public television signals. While these figures cannot necessarily be directly correlated to the Bortz study results, they confirm -- as do the Bortz results -- that distant retransmission of public television programming has significant benefit and value for a sizeable number of cable operators and the subscribers they are trying to attract to their systems.

**5. Public Television's Unique Slate of Children's Programming Is a Particular Benefit for Cable Operators in Attracting Subscribers**

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One of the particular benefits of public television programming is its unique and unparalleled children's programming. (See PTV Exhibit 9.) Public television shows such as SESAME STREET and READING RAINBOW have long been recognized by parents as programs that they want their children to watch. New additions to the PBS childrens' programming lineup, such as BARNEY & FRIENDS, SHINING TIME STATION and LAMB CHOP'S PLAY ALONG, have continued and built on this fine tradition. Thus, cable operators who are able to offer such programming via distant signal retransmission -- or who are able to offer such programming at different times of day by importing distant signals to complement their local public television offerings -- gain a real and identifiable benefit in attracting subscribers to their systems. Over one-third of all households in the United States have children under the age of 12; and nearly one in six households have children under six years of age.<sup>4/</sup> That is an obvious target group for cable operators -- and the ability to offer children's programming of value and interest to parents can therefore be a substantial benefit flowing from the distant retransmission of a public television signal.

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<sup>4/</sup> U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Household and Family Characteristics, Table 18, March 1990 (Series P-20-447); March 1991 (Series P-20-458); March 1992 (Series P-20-467).

methodology developed by Kagan in deriving the 24-cent estimate can also be applied to these other signals. This produces an estimated monthly license fee for the second public television signal of 11 cents per subscriber, and 8 cents per subscriber for the third signal.

I recognize, of course, that the Kagan study and the underlying Hecht survey were conducted in 1993, and not during the years directly at issue in this proceeding. Nonetheless, in my judgment the estimated license fees have clear relevance to the award of 1990-1992 cable royalties -- because they are derived ultimately from the preferences of cable subscribers for public television programming, and those preferences are not likely to have changed significantly between the 1990-1992 period and 1993.

The estimated license fees from the Kagan study can be used to derive an award for public television in this proceeding. In general terms, this entails determining the number of subscribers who received their first, second, or third or more public television signal on a distant signal, and multiplying those numbers by the estimated license fees.

At the outset, however, it is necessary to deflate the 1993 estimates to take account of the increases in cable licensing fees that have been experienced in the marketplace between 1990 and 1993. During that period, the overall level of license fees for the specialty cable channels most comparable to public television -- Arts & Entertainment, The Discovery Channel, The Learning Channel, and Nickelodeon -- has increased on average approximately 14.21% per year. Thus, it is appropriate to deflate

the 1993 estimated licensing fee estimates to take into account the fact that licensing fees have increased generally between 1990 and 1993. This results in estimated monthly license fees per subscriber for each year between 1990 and 1992 as listed below:

	1990	1991	1992	1993
First PBS Distant Signal Fee	16.1¢	18.4	21.0	24
Second PBS Distant Signal Fee	7.4¢	8.4	9.6	11
Third (+) PBS Distant Signal Fee	5.4¢	6.1	7.0	8

These estimated license fees can then be multiplied by the number of cable subscribers who received their first, second, or third (+) public television signal via distant signal retransmission. See PTV Exhibit 23. The total license fees for public television, based on these calculations, are presented below:

	1990	1991	1992
Revenue From First Station	\$4,174,080	\$4,654,347	\$5,271,870
Revenue From Second Station	\$2,366,481	\$2,599,324	\$3,017,074
Revenue From Third Station (+)	\$1,060,432	\$1,311,450	\$1,624,153
Total License Fee Revenue	\$7,600,933	\$8,565,120	\$9,913,097
Percentage of Basic Fund	5.6%	6.0%	6.7%

These figures again are close to the adjusted Bortz results for public television. This is another and independent confirmation of the estimated values for public television as reflected in the

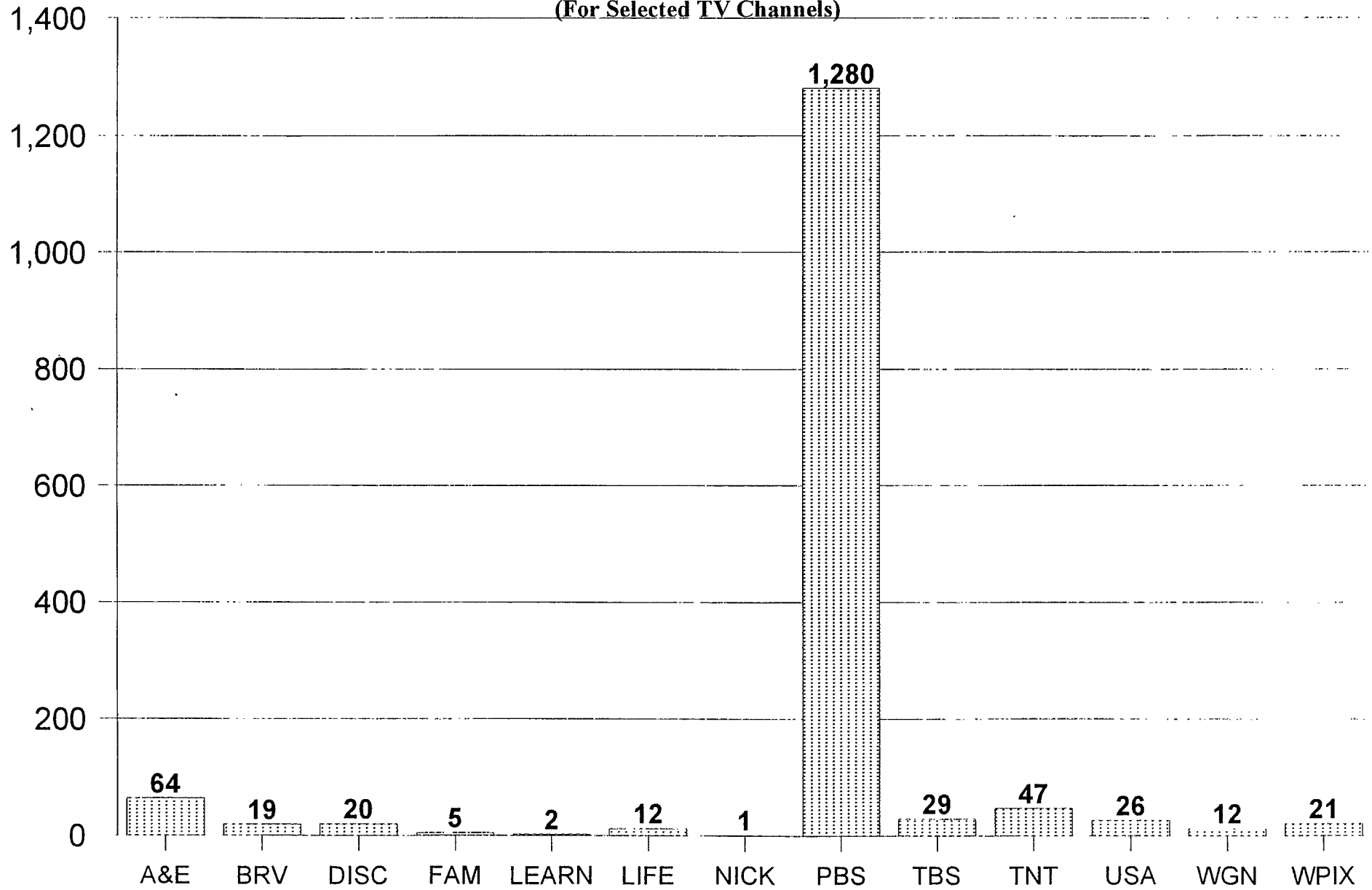
**-- EXHIBITS --**

20. Adjusted Bortz Shares Allocated Among All Parties
21. Adjusted Allocation of Basic and 3.75 Funds
22. Instances of PBS Distant Carriage
23. Subscribers Receiving PTV Signals Via Distant Retransmission
24. Overlap of Distant Signals With Local PBS Signals
25. Cable Executives See Public Television As Necessity
26. Cable Executives Value Diversity
27. Cable Operators Do Not Use Viewing Data to Choose Programming
28. Cable Operators Seek to Attract and Retain Subscribers
29. Television Listings for PBS and Select Cable Channels
30. Top-of-the-Ratecard License Fees Charged by Selected Cable Channels
31. Monthly License Fees Charged By Selected Cable Networks
32. Selected Cable Channel License Fee Revenue: 1990-1992
33. Program Budget For Selected Cable Channels and PBS: 1990-1992
34. Prime-Time Average Audience Ratings
35. PBS Station Head-to-Head Program Duplication
36. Program Funds Flow for Public Television in the United States
37. Resume -- William B. Fairley
38. PBS Shares Among Operators that Carried a Distant Signal 1990-1992
39. Likelihood of Observing Actual Sample of PBS Shares Reported by Survey Respondents
40. Bortz Survey Data 1990-1992

**-- EXHIBIT 14 --**

# THE BOSTON GLOBE

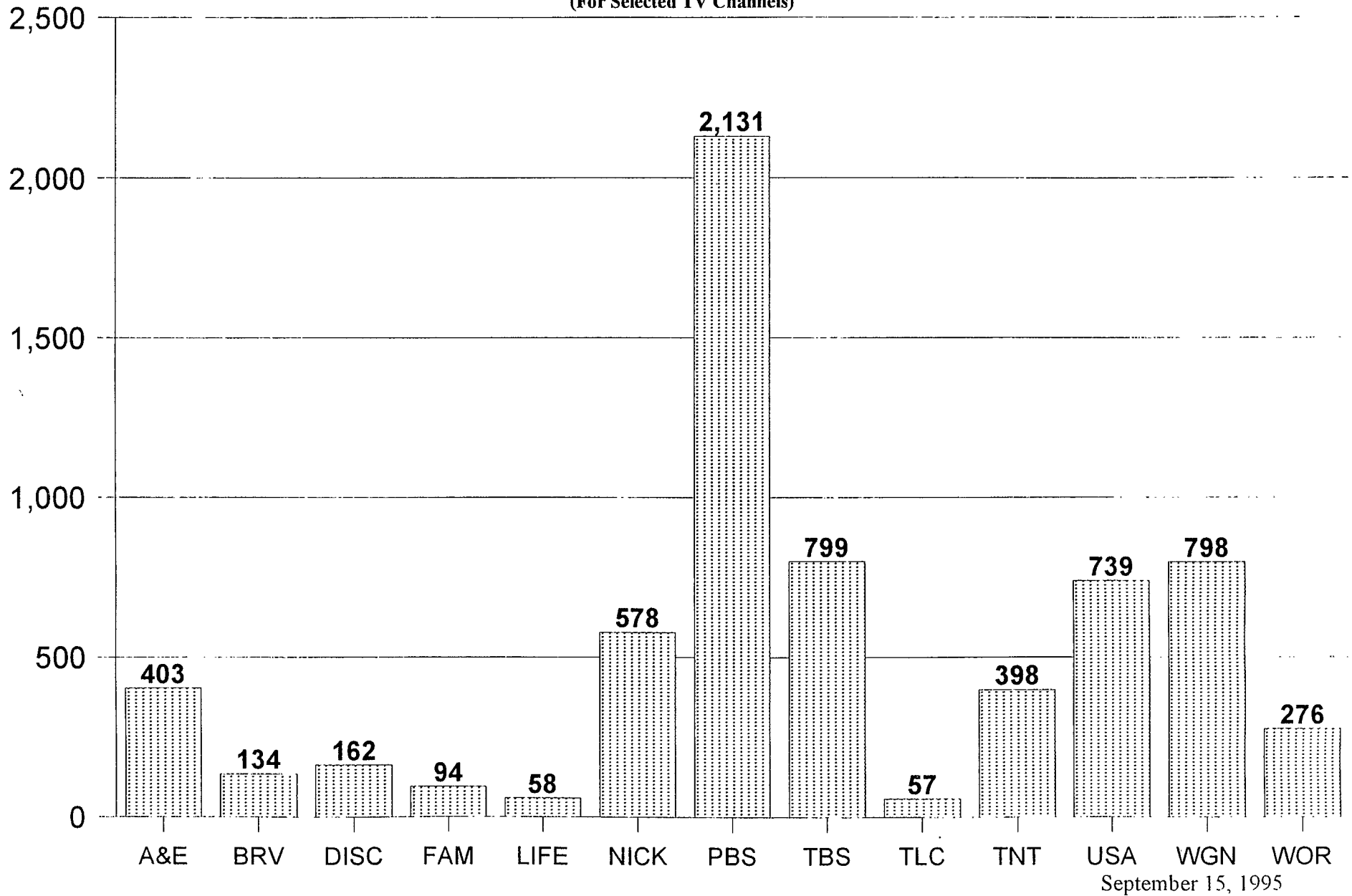
*Total TV Program Highlights 1990-1992*  
(For Selected TV Channels)



September 15, 1995

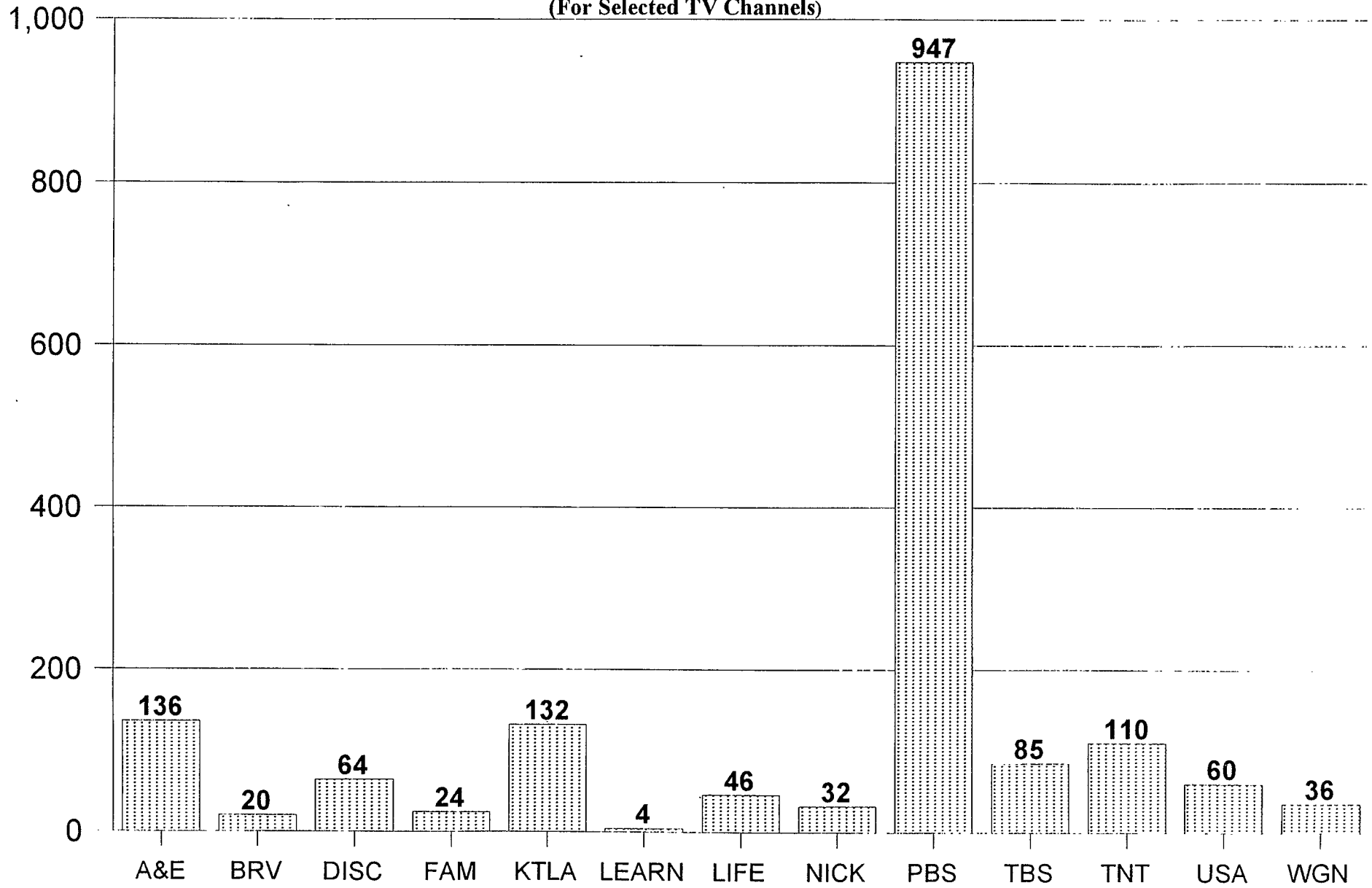
# THE CHICAGO TRIBUNE

## *Total TV Program Highlights 1990-1992* (For Selected TV Channels)



# THE LOS ANGELES TIMES

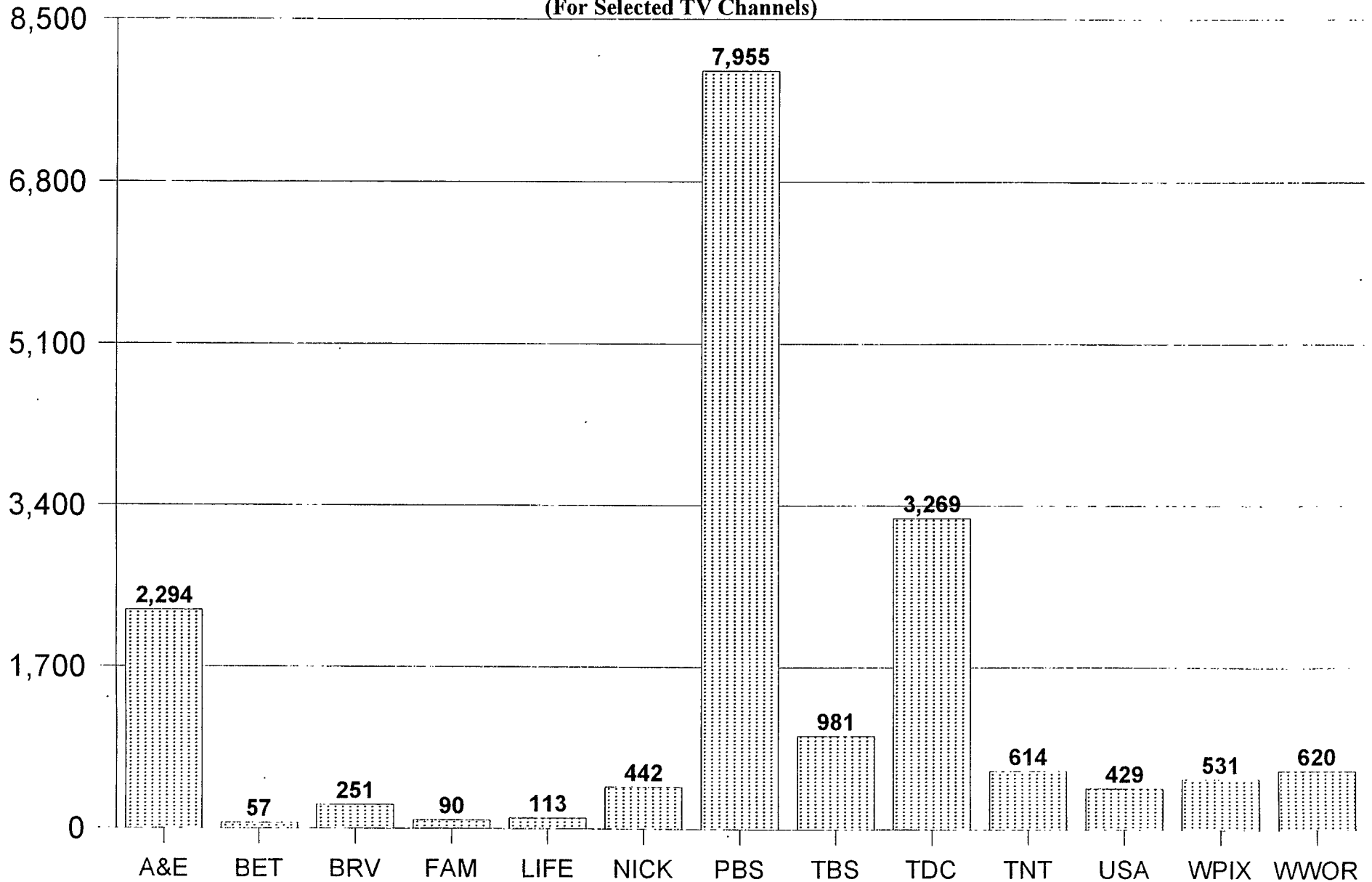
*Total TV Program Highlights 1990-1992*  
(For Selected TV Channels)



September 15, 1995

# THE NEW YORK TIMES

## *Total TV Program Highlights 1990-1992* (For Selected TV Channels)



September 15, 1995

**-- EXHIBIT 22 --**

## Instances of PBS Distant Carriage for Form 3 Systems

	1989	1990	1991	1992
Educational Stations Carried on a Distant Basis (Average of Two Accounting Periods)	475	509	523	535
Total Distant Subscribers	6,315,928	6,370,825	6,410,178	6,591,336
Percent of Distant Carriage that is Educational	6.7%	7.2%	7.2%	7.3%
Percent of Basic Carriage that is Educational (Excludes Carriage of 3.75 Signals)	7.4%	7.9%	7.9%	8.0%

Source: Cable Data Corporation, "Station Summary" and "SSUPLMNT" Tables.

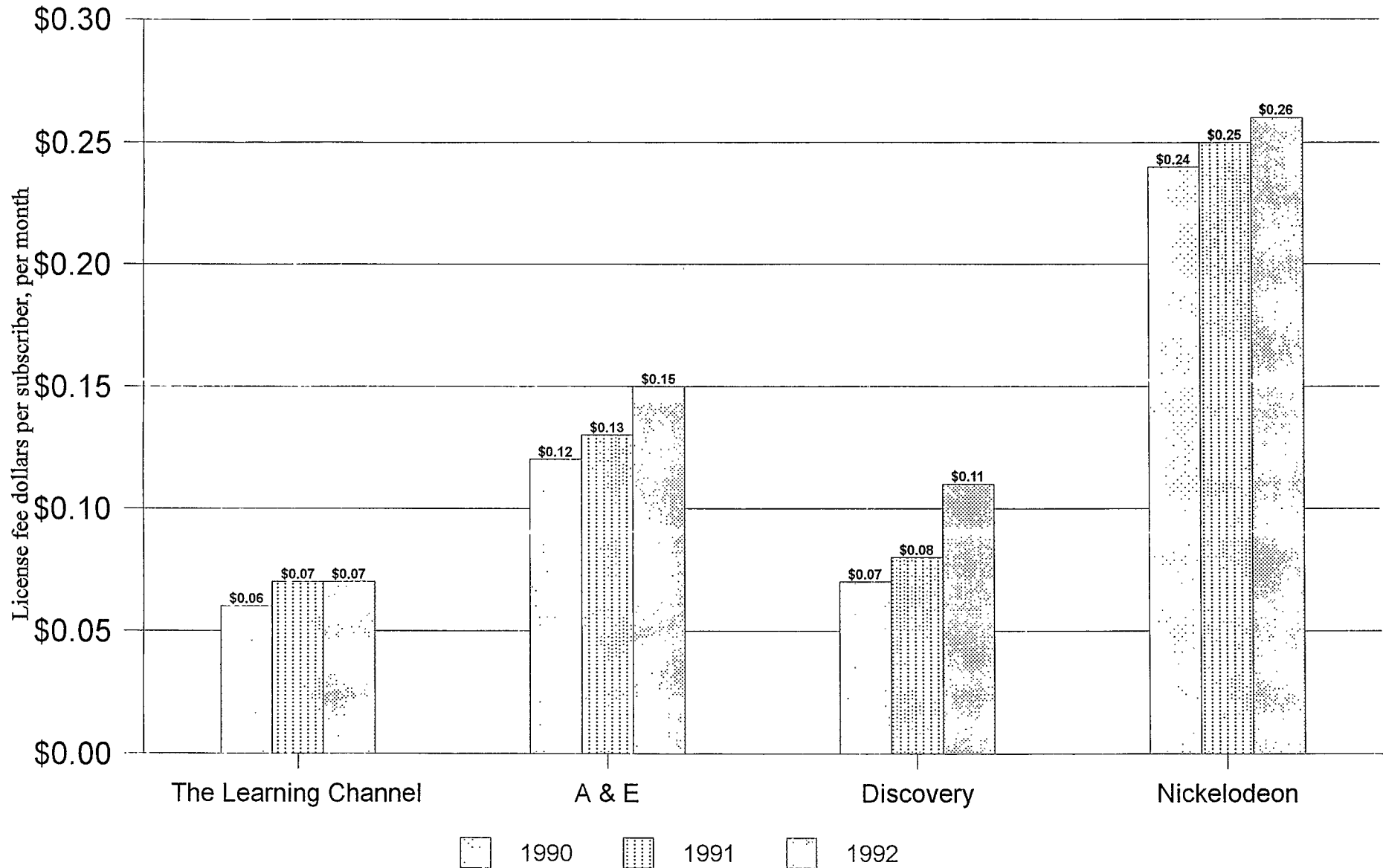
**-- EXHIBIT 23 --**

SUBSCRIBERS RECEIVING PTV SIGNALS VIA DISTANT RETRANSMISSION				
Year - Reporting Period	Subscribers Whose First PTV Signal is Distant	Subscribers Whose Second PTV Signal is Distant	Subscribers Whose Third(+) PTV Signal is Distant	Total Cable Subscribers
90-2	2,160,497	2,664,956	1,636,469	44,360,093
91-2	2,107,947	2,578,694	1,791,598	46,611,815
92-2	2,092,012	2,618,988	1,933,516	49,641,458

Source: Cable Data Corporation, "EDCNTOTL" Table and "SSF3SUMS" Table

**-- EXHIBIT 30 --**

## Top-of-the-Ratecard License Fees Charged by Selected Cable Channels

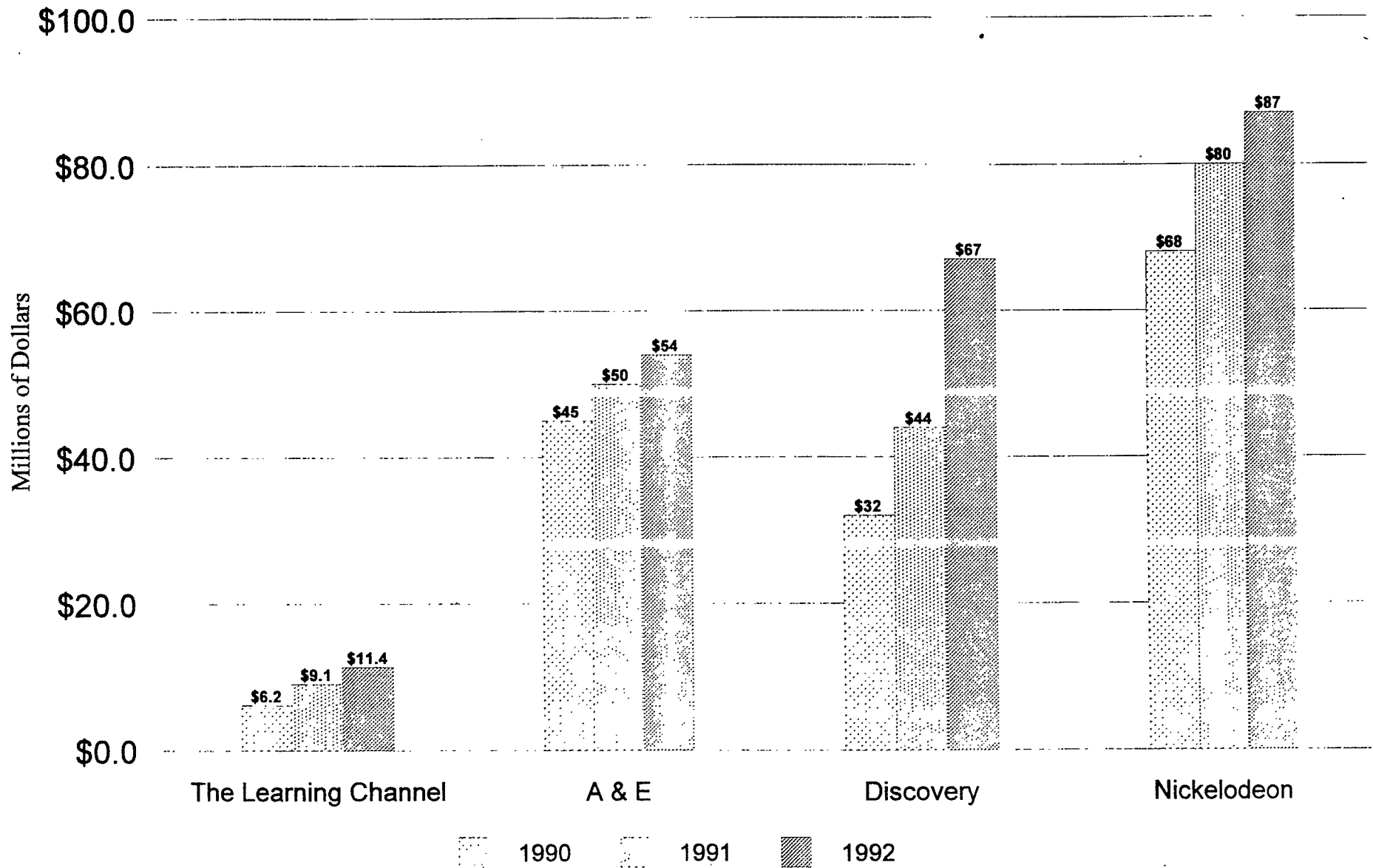


SOURCE: PAUL KAGAN, CABLE TV PROGRAMMING AND PBS-- March 27, 1992

**-- EXHIBIT 32 --**

# Selected Cable Channel

## License Fee Revenue 1990-1992 (Millions)



SOURCE: PAUL KAGAN, CABLE TV PROGRAMMING AND PBS-- March 25, 1991 & January 29, 1993